SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 3[illegible]

TWIN CITY MINING & SMELTING COMPANY,

vs.

CHILIAN MINING COMPANY, et al.

APPEAL FROM THE SUPREME COURT OF THE STATE OF [illegible]

STATEMENT OF THE FACTS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 866

TWISP MINING & SMELTING COMPANY,
Appellant,

vs.

CHELAN MINING COMPANY, A CORPORATION, ET AL.,
Appellees.

STATEMENT AS TO JURISDICTION

In accordance with Rule 12 of the Rules of this Court, the above named appellant filed the following statement disclosing the basis upon which is contended that this Court has jurisdiction upon appeal to review the final order or final judgment of the State Supreme Court appealed from herein.

Basis Upon Which This Court Has Jurisdiction

The Supreme Court of the State of Washington, the highest Court of said State, refused to give the appellant the benefits of the provisions of Section 3803-31, paragraph I of Remington's Revised Statutes (Sup.), of the Uniform Business Corporation Act of the State of Washington,

of 1933, which went into full force and effect on January 1, 1934, which provided:

> "A director shall hold office for the term for which he was named or elected and until his successor is elected and qualified."

And the provisions of the By-Laws of the Appellant, which provides:

> Trustees: "Shall hold office for one year and until their successors are elected and qualified."

And thereby denied the *"Stockholders of the Twisp Mining & Smelting Company"* their constitutional right to have a vote of the majority of the Board of Seven Trustees, before all the assets of the Twisp Mining & Smelting Company could be legally sold, and by so doing has denied these Stockholders the equal protection of the laws of the State of Washington and in so doing has unlawfully sanctioned the confiscation of the property and property rights of the Stockholders of the Twisp Mining & Smelting Company without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States, which provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In this instant case, the Receiver, and the Chelan Mining Company and the Methow Gold Corporation, by their respective Counsels and with the knowledge and acquiescence of said corporations that said "Quit Claim Deed" of date of January 31, 1934, Exhibit 20, was a "Forged Deed" within the meaning of Section 2586 of Remington's Re-

vised Statutes of the State of Washington, for the reason that John C. Sawbridge, who purported to execute same, was not the President of the Twisp Company and for the further reason that James O. Cull, who purported to execute same, was not the Assistant Secretary of the Twisp Company and neither of them were ever legally authorized to execute such a Deed by the Board of Trustees of the Twisp Company, as later will appear in this proceeding; and knowing that as a matter of law no right, title or interest or right of possession passed to the Receiver of the Chelan Mining Company or the Methow Gold Corporation by virtue of said "Forged Quit Claim Deed," deliberately and intentionally planned and carefully executed a scheme to defraud the Twisp Mining & Smelting Company and the State Supreme Court by falsely claiming to the State Supreme Court that the question of the "Forged Deed" was never raised in the trial Court, well knowing that said statements were false and untrue, and by reason of those false statements said Counsels unlawfully induced the State Supreme Court to refuse to pass on the question of the "Forged Deed" and said Receiver, the Chelan Mining Company and the Methow Gold Corporation, obtained a fraudulent begotten affirmance of the judgment of the Superior Court of Okanogan County, State of Washington, which cannot be allowed to stand under the decision of this United States Supreme Court in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 88 Law Ed. Advance Opinion 936, where that Court, among other things, said:

> "Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulent begotten judgments."

Statutory Provisions Sustaining Jurisdiction

The Act of February 13, 1925, Chapter 229, 43 Stat. 936, effective May 13, 1925 (United States Judicial Code,

Title 28, Section 344), provides that Section 237 (a) of the Judicial Code is amended to read as follows:

> "A final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had, where there is drawn in question * * * the validity of a statute of any State, on the grounds of its being repugnant to the Constitution, Treaties or Laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a Court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the Court from which it was removed by the writ."

Also, the Act of January 31, 1928, Chapter 14, 45 Stat. 54, provides:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress, that writs of error in causes, civil and criminal, are abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtained by appeal."

Also, the Act of April 26, 1928, Chapter 440, 45 Stat. 466, amended Section 2 of the Act of January 31, 1928, to read as follows:

> "The statute regulating the right to writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relative to costs, supersedes, with mandate, shall be applicable to the appeals which the preceding section substituted for writ of error."

Washington Statutes Involved

The Statute of the State of Washington, Section 3803-31, Paragraph 1 of Remington's Revised Statutes (Sup.) of the Uniform Business Corporation Act of 1933, which went into full force and effect on January 1, 1934, the validity of which as construed and enforced by the State Supreme Court is attacked by appellant, as follows:

The Statute expressly provides that "Trustees" or "Directors" of Boards of Trustees of Corporations in the State of Washington shall hold office until their successors are duly elected and duly qualified, and while John B. Hottel and Chas. W. Julian resigned as Trustees on August 15, 1932, and John Goetz and Frederick C. MacDonald were elected as "Trustees" in their place and stead, their office as Trustees on the Board of Seven Trustees of the Twisp Mining & Smelting Company was not vacant and could not legally be held to be vacant until their successors were duly elected and qualified and the State Supreme Court was bound by that statutory provision and had no legal power or authority to hold otherwise.

The State Supreme Court, therefore in holding that since John Goetz and Frederick C. MacDonald, as James O. Cull contended, had failed to qualify as Trustees by failing to take their oath of office, there were two-vacancies on the Board of Seven Trustees of the Twisp Company during the month of January, 1934, exceeding its statutory jurisdiction, power and authority and unlawfully deprived the Stockholders of the Twisp Company of the equal protection of the Statutory Laws of the State of Washington, and unlawfully sanctioned the taking of their property and property rights without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States under the following decisions of this Court, to-wit:

In *Ranson* v. *Williams*, 2 Wall 313, 17 L. Ed. 803, this Court held:

> "The extent and nature of the power depends upon the terms in which it is conferred and it will not be enlarged because exercised by Courts clothed with general jurisdiction; and any judgment by a tribunal without authority or which exceeds or lies beyond its authority is necessarily void and may be shown to be so in collateral proceedings even though it be a Court of general jurisdiction, because no authority derived by law can transcend the source from whence it came; and the principle that a limited authority must appear to have been strictly construed even when the acts of the Superior Court are in question, is well settled." Also see Murry v. American Surety Co., 70 Fed. (9th. C. C. A.) 341, holding the same views.

In *John Vallely, as trustee in Bankruptcy*, v. *Northern F. & M. Ins. Company*, 254 U. S. 348, 65 L. Ed. 297, in a well reasoned opinion on this subject, held:

> "Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal."

And, therefore, the State Supreme Court's holding above referred to was absolutely void, when entered, and ever thereafter.

Section 3803-36, Paragraph 1, of Remington's Revised Statutes (Sup.) provides:

> "A voluntary sale, lease or exchange of all the assets of a corporation may be authorized by it upon such terms and conditions as it deems expedient, including an exchange for shares in another corporation, domestic or foreign." and under paragraph 2, of same section it provides:

"* * * If the corporation be unable to meet its liabilities then matured, such authorization may be given by the vote of the board of directors."

And Article 11, Section 5 of the Twisp Mining & Smelting Company's By-Laws, provides:

"Special meetings of the Board of Trustees shall be held whenever called by the President, or by one-third of the Trustees for the time being in office. The Secretary shall give notice of each special meeting by mail, the same to be at least two days before the meeting or by telegraph at least one day before the meeting, to each Trustee; but, such notice may be waived by any Trustee. At any meeting at which every Trustee shall be present, even though without notice, any business may be transacted."

In *Bruch v. National Guarantee Credit Corporation*, (Del.), 116 Atl. 738, the Court held:

"Unless notice be given to each Director, as required by the by-laws of the corporation, the meeting is illegal, and the action taken is not binding."

There is also involved on this appeal, the question of the application of Section 2586 of Rem. Rev. Stat., of the State of Washington to this instant case, which provides:

"The false making or forging of any instrument or writing purported to have been issued by and in behalf of a corporation * * * and bearing the pretended signature of any person therein falsely indicated as an agent or officer of such corporation * * * is forgery in the same degree as if that person were in truth such officer or agent of such corporation."

Date of Final Order or Judgment Appealed From

The "Original Judgment" of the State Supreme Court in this case was entered on March 29, 1943. An appeal

was duly taken from that Judgment to the United States Supreme Court and on December 6, 1943, the United States Supreme Court denied the appeal on the grounds it had no jurisdiction of the case and the Mandate of the United States Supreme Court was duly filed with the Clerk of the Supreme Court of the State of Washington on January 24, 1944, and under the ruling in *White* v. *Donini*, 173 Wash. 34, 21 Pac. (2d) 265, the State Supreme Court defines the State Statute that gave this Appellant a further remedy, namely:

> "Two questions are presented by the petition: (1) Has this Court jurisdiction to grant the Trial Court permission to hear the two motions presented by the petition? and (2) If this Court has jurisdiction, is this a proper case for its exercise? That the Court has power is beyond question under our decisions. Haaga v. Saginaw Logging Co., 170 Wash. 93, 15 Pac. (2d) 655; State Ex rel Cross v. Superior Ct., 158 Wash. 46, 51, 290 Pac. 430; In re Shilshole Avenue, 101 Wash. 135, 172 Pac. 338. The present writer did not subscribe to the prevailing opinion in the recent Haaga case, but expressed his dissent therefrom. The dissent was based upon the grounds that the evidence therein, on which a new trial was sought, was not, 'newly discovered,' but 'newly created.' That is, that it was evidence of a condition that had arisen long after trial and judgment, and further, that it was not shown that any fraud had been practiced in securing the verdicts. The case at bar not only falls within the rule in the Haaga case, but also escapes the disapproval voice in the dissent. The evidence here sought to be introduced is not only newly discovered, but raises a question of false testimony."

The case cited above, In Re Shilhshole, 101 Wash. 135, holds that when the Petition for relief is filed within one year after the final decision on all Appellant's rights on

the appeal, it is filed within the time prescribed by Statute of the State of Washington.

The Petition for relief in this case was duly filed with the Clerk of the State Supreme Court on June 23, 1944 and denied on July 21, 1944 and petition for rehearing was duly filed and denied on August 29, 1944, and the final order sought to be reviewed by this Court is dated August 29, 1944, and this application for appeal to this United States Supreme Court was presented to the Chief Justice of the State Supreme Court on November 20, 1944 and order allowing the appeal was entered on November 20, 1944.

Statement of Case

The Twisp Mining & Smelting Company, Appellant herein, on January 31, 1934 was the fee simple owner and in actual possession of certain Homestead lands and entitled to the exclusive possession and enjoyment of certain unpatented mining claims by virtue of a grant from Congress and also entitled to the exclusive possession and enjoyment of the Three Patented Mining claims of the Alder Group Mining & Smelting Company, by virtue of an "Executory Sale Contract" of date of November 23, 1927, executed by the Alder Group Mining & Smelting Company, as a defacto corporation and proof of those facts were duly recorded in the office of the Auditor of Okanogan County, Okanogan, Washington on June 27, 1932, in Volume 76 of Deed Records, at page 416, et seq.; and Volume 76 of Deed Records, at page 417, et seq.; and Volume 9 of Miscellaneous Records, at page 303, et seq.; as shown by the records and which facts were not disputed by any of the defendants in the action in Okanogan Superior Court in case No. 10158 of the records of that Court. (See St. pp. 10 to 21, for testimony of the Auditor on that subject.)

The basis of the Twisp Mining & Smelting Company's action in the Superior Court of Okanogan County, State of Washington, as shown by the trial Court's memorandum opinion of January 7, 1941, was:

> "It is plain from the allegations of the complaint * * * that the plaintiff is seeking to stand squarely on the proposition that the actions of the Trustees of the plaintiff in January, 1934 were wholly without authority and therefore did not bind the plaintiff corporation, and that the illegal character of the performance was known to the officers and agents of the Chelan Mining Company,—in fact the plaintiff alleges that the agents and managing officers of the Chelan Mining Company participated in, and were accessories in those unlawful and illegal proceedings carried on in January, 1934 when ostensibly the properties of the plaintiff were conveyed to the defendant, Chelan Mining Company. * * * This being the situation I must look upon the complaint as being a single purpose effect to set up invalidity in the conveyance attacked on the sole grounds that it was consummated without any authority and was not binding on the Twisp Mining and Smelting Company, the plaintiff herein, and that all the allegations in the complaint to the effect that the officers and agents of the Chelan Mining Company aided, abetted, cajoled and induced the officers and agents of the plaintiff in the illegal perpetration, are to be taken and considered merely for the purpose of showing that the Chelan Mining Company had notice all along of the invalidity and unholy character of the color of title which it acquired." (See St. 342, for original.)

Robert H. Strong, testified on the trial of the action in Superior Court of Okanogan County, State of Washington, that he and his associates in the agreement of November 17, 1933, Mr. McDowell, Mr. Robinson and Mr. Julian, signed Exhibit No. 26, of date of December 12, 1933, which

was introduced in evidence (St. 157), and read from said instrument, as follows:

> "In the memorandum which the four of us enter under date of November 17, 1933, it was set out in paragraph 2 that we were to obtain a new contract satisfactory to the four of us from the Twisp Company" And then I go on and say: "If agreeable to you, I think it would be wise to mutually agree that I am at liberty to enter into any arrangement with the Twisp Co., either in the form of a contract or by transfer of stock, between a new company and the Twisp Company, or in any other manner enter an agreement with these people, if the same is done in the interest of all four of us and otherwise in accordance with the Spirit of the contract". (Meaning the November 17, 1933 contract). "That is my letter. I didn't read it completely." (St. 150, 151).

The part of the letter omitted by Mr. Strong reads as follows:

> "As things are developing now it is probable that we will not ask for any contract from the Twisp Co., but rather a transfer of the property to a new corporation that will be formed."

And further testified:

> "These men that signed this agreement (Ex. No. 26) left all the details to me. That is the meaning of this agreement and those negotiations were ratified and approved at the time of the incorporation of the (Chelan Mining) company contained in the letter and set forth in the minutes that has already been identified and offered in evidence." The above testimony is shown in the record (St. 152) and the minutes referred to are shown in the record (St. 85 to 97).

The record shows that Mr. Strong, prior to the purported meeting of the Board of Trustees of the Twisp Company of date of January 17, 1934, obtained information from

James O. Cull, the Attorney for the Twisp Company, that the Executory Sale Contract (Ex. No. 4) of date of November 23, 1927, between the Alder Group Mining & Smelting Company, acting as a "Defacto Corporation" as Vendor and John L. Magney, as vendee, of the three patented mining claims was never cancelled and was in full force and effect and it was arranged between Robert H. Strong and James O. Cull that Robert H. Strong would form a new corporation, by the name of the Chelan Mining Company, to take over the assets of the Twisp Mining & Smelting Company and would want a representative Trustee in Washington. (St. 32.)

> Mr. Cull testified, "I knew at all times on January 29th, and on January 30th, when the last meeting was held, and on the 17th when the first meeting was held, that I was to be a local Director in Washington of the Chelan Mining Company. That had been understood and arranged that I was to act as a director of the Chelan". (St. 35.)

The decision of the State Supreme Court, as reported in the Bound Official Volume, in case entitled, *Twisp Mining & Smelting Company* v. *Chelan Mining Company, et al.*, 16 Wash. (2d) 264, 133 Pac. (2d) 300, states the law of this case in regard to special meetings of the Board of Trustees of the Twisp Mining & Smelting Company, as follows:

> "The appellant argues that the overwhelming weight of authority, as stated in Fletcher's Cyc. of Corporations, Vol. 2, p. 162, 393, is that, when the power to do particular acts, or general authority to manage the affairs of a corporation, is vested in a board of Trustees, they are vested in the Trustees not individually, but as a board, and the Trustees can act so as to bind the Corporation only when they act as a Board and at a legal meeting. Appellant states that the rule and the reasons therefore are well stated in Ames v. Goldfield Merger Mines Co., 227 Fed. 292. We may admit the

above rule is a correct statement of the law, but we fail to see where it is applicable here." Also see Trethewey v. Green River Gorge, 17 Wash. (2d) 697, at 727 and 728, 136 Pac. (2d) 1011, 1012, holding the same rule of law.

James O. Cull testified on the trial in the Superior Court of Okanogan, State of Washington, after admitting that four of the so-called Board of Trustees of the Twisp Mining & Smelting Company, which he maintained was a Board of Five Trustees, because John Goetz and Frederick C. MacDonald, although they were duly elected as Trustees of the Board of Seven Trustees, had not qualified, had signed a written consent to hold a special meeting of that so-called Board of Five Trustees on January 17, 1934, as follows:

"Q. Will you (Mr. Cull) examine the preamble to the minutes of January 17, 1934, and state whether or not that was a regularly called meeting * * *?

A. * * *. There was notice to the Directors that we recognized, *except Roy Magney, who was absent* and I didn't know at the time where he was. Mr. Simonds notice had been sent to him but so far as a notice as required under the By-Laws to hold a meeting to act upon the questions then considered, it was not a regularly called meeting." (St. 26) (Italics ours.)

In *Broughton* v. *Jones* (Mich.), 79 N. W. 691, the facts were:

The Board of Directors consisting of four Directors and two met and passed a resolution to mortgage all the property of the corporation. The Court held the mortgage void, saying:

"There does not seem to be any written record of the election of Directors, but we think it is clearly established that there were four directors, who undertook

to and did manage the affairs of the Company. Such authority, as was given at the special meeting of the Directors, at which meeting but two Directors were present, was invalid. There is nothing to show that the other Directors were even notified that such a meeting was to be held or that such action was to be taken. While the management of the Corporation is usually left to their Directors. *No Court,* so far as we know, has ever held that one-half of the Directors of a corporation, without the knowledge of the others, can dispose of all the property of a corporation by action at a special meeting, notice of which is not given to all of the Directors."

And Mr. Cull further testified:

"At the time the transaction was made with the Chelan and for months before that I had been unable to get in touch with Roy Magney, *who was a Director,* or learn his address and that was the reason for the meeting of the 17th of January. I was having correspondence at the time and hoped to get in touch with him in time for that meeting. *I didn't Send out Notices for the January 17 Meeting.* When Mr. Cole called attention to *that we sent out notices and called a meeting for the 30th.* I didn't get in touch with him for some time after that, but I learned his address and I mailed the notice to him at Denver, Colorado." (St. 52)(Italics ours).

Q. At whose suggestion was that meeting called?

A. Mr. Cole, an Attorney, at the suggestion of Mr. Strong, raised the question as to sufficiency of the notice.

Q. Was that the reason?

A. That was the reason another meeting was called for the 30th, * * *.

Q. Did you have a formal meeting (Of the Board of Trustees of the Twisp Mining & Smelting Company) which required the sending of formal notices between the 15th of August, 1932, and the 30th of January, 1934?

A. No." (St. 27).

The decision of the State Supreme Court, entitled *Twisp Mining & Smelting Company* v. *Chelan Mining Company, et al.*, 16 Wash. (2d) 264, 289, 133 Pac. (2d) 300, at 311, shows that Jeffers, J. who wrote the Opinion, ignored the Record, and based his opinion on a purported fact, which was manifestly contrary to the evidence, namely, that the purported Special Meeting of Board of Trustees of the Twisp Mining & Smelting Company of date of January 17, 1934 was a regular called special meeting of the Board of Trustees of the *Twisp Mining & Smelting Company* and *Scott V. McNeil*, 154 U. S. 34, 39, 38 L. ed. 895, reversed a decision of this same State Supreme Court, which held that the decision of a Probate Judge, which held that a man was dead, when in fact he was not dead, was a valid decision, and held:

> "The decision of the ordinary that the person on whose estate he acts is dead, if the facts be otherwise, does not invest the person he may appoint with the character of an Administrator".

And likewise the decision of the Trial Court and the State Supreme Court that the purported special meeting of the Board of Trustes of date of January 17, 1934, was a regularly called meeting, did not and could not be upheld, when the evidence positively shows that it was not a regularly called meeting and by reason of that fact, no legal special meeting was held and no legal resolution could have been and was not legally passed at such a purported informal special meeting and said purported resolution was in fact null and void from its inception.

The only power that the Board of Trustes of the Twisp Mining Company had to dispose of all the assets of the Twisp Company, is granted to them by virtue of Section 3803-36 of Remington's Revised Statutes (Sup.) of the

Uniform Business Corporation Act of 1933, which expressly provides:

> "A voluntary sale, lease or exchange of all the assets of a corporation may be authorized by it upon such terms and conditions as it deems expedient, including an exchange of shares in another corporation. * * *. *If the corporation be unable to meet its liabilities then matured, such authority may be by the vote of the Board of Directors*". (Italics ours.)

In Enright, as Trustee in Bankruptcy of the *New Foundland Syndicate* v. *Hecksher*, 240 Fed. (2nd. C. C. A.) 863, the Court in a similar case held:

> "The Newfoundland Syndicate is a corporation incorporated under the Laws of the State of New Jersey in 1904. It will be hereafter referred to as a Syndicate. The object for which the Syndicate was formed were inter alia, to purchase, acquire, or lease mines or mineral lands of every kind, nature and description, to work, prospect and develop mines and mineral lands, and to engage in and operate in mining of all kind. Law provided when a stockholder received stock, from a corporation as fully paid, for which he gave less than par, he is liable for interest, as damages for the retention of the money, on the balance due. *Trial Court held in substance that the spirit and policy of the act was so clearly opposed to any arrangement by which corporations shall issue stock without receipt by the company of an equivalent in value to its par that any arrangement to this effect must be void, as contrary to public policy of the law.* Citing Easton National Bank V. American Brick & Tile Co., 70 N. J. Eq. 722, 730, 64 Atl. 1095, where the Court of Errors and Appeals, referred to the New Jersey Corporation Act, declared that: "If any doubt has existed upon this question, it must be taken as settled by the decision of this Court in Volney V. Dixon, 68 N. J. Eq. 605, 60 Atl. 189." and the Court further held: "It seems from the minutes that there were five Directors present, but Munford was

interested in this transaction, and left the room or retired while the Directors were considering this proposition, and was not present when it was acted upon. Of course, it would constitute a quorum if he were there, even though he did not vote; but if he left the room, so as to leave only four Directors present, and nine were required, it seems clear there would have been no meeting at the time the action was taken, therefore there would be no finding by the Directors, as required by Section 49 of the Corporation Act or Law, that the value of the property transferred was equal to the value of the stock issued." *The Resolution purported to have been passed at that informal gathering of the four Directors was held to be a nullity.*

Likewise, in this instant case, Mr. Cull, Mr. Strong and his Attorney Mr. Cole, all admit that no notice of the holding of the purported special meeting of the Board of Trustees of the Twisp Mining & Smelting Company for January 17, 1934, was ever given to Roy K. Magney, one of the Board of Trustees, which James O. Cull claims was a Board of Five Trustees, and Roy K. Magney was not present at the purported special meeting of January 17, 1934, therefore, as a matter of law, there was no legal meeting of the Board of Trustees of the Twisp Mining & Smelting Company was held on January 17th, 1934.

Therefore, as a matter of law, there could be no legal finding made by those "*Trustees*" that were present at that Informal Meeting, as required by Section 3803-36, paragraphs 1 & 2, of Remington's Revised Statutes (Sup.) of the Uniform Business Corporation Act of 1933 that the Twisp Company was unable to meet its liabilities then matured for the obvious reason that those Trustees that were present at that "Informal Meeting" had no jurisdiction to even attempt to transact any business or to pass any resolution, which in any way purported to authorize the transfer of all the assets of the Twisp Mining & Smelting Company to

Robert H. Strong for the Chelan Mining Company, which was to be formed, and therefore the purported "Resolution" of date of January 17th, 1934, was absolutely null and void from it's inception under the authority of *Enright, as Trustee in Bankruptcy v. Hecksher*, 240 Fed. (2nd C. C. A.) 963, *supra*.

In accordance with the understanding and agreement of Robert H. Strong the Promoter of the Chelan Mining Company, with James O. Cull, prior to January 17th, 1934, the Chelan Mining Company was incorporated on January 26th, 1934, and Robert H. Strong, *James O. Cull*, James Cole, P. M. Robertson and George M. McDowell were named in the Articles of Incorporation, as the Board of Directors of the Chelan Mining Company (Tr. 56).

That Robert H. Strong, P. M. Robertson and George M. McDowell, who constituted a majority of the Board of Five Trustees duly held the initial meeting of the Board of Directors of the Chelan Mining Company on January 29th, 1934, and Robert H. Strong was elected as "President", and George M. McDowell was elected as Vice-President and P. M. Robertson was elected as Secretary and Treasurer and *James O. Cull* and James Cole were elected as Assistant Secretaries (St. 85 and 86). Thereupon Robert H. Strong presented a letter of date of January 29, 1934, to the "Directors" which is quoted on pages 87 to 91 of the Statement of Facts and the Trustees passed a resolution, which provided:

> "Be it resolved, that each and every offer, proposed or requested contained in Mr. Strong's letter to this company dated January 29th, 1934, hereinbefore set out, be, and they and each of them, are hereby accepted and in all respects approved, and granted, and "Be it Generally Resolved, That said Robt. H. Strong be, and he is hereby, given the authority and powers requested in and by said letter, whether they are in these resolutions specifically mentioned or not, as it is the desire

of these Directors to place Mr. Strong in a position to proceed in behalf and in the name of this company with the various matters and things referred to in the letter mentioned, in the manner and under the terms and conditions set forth in said letter, and

"BE IT FURTHER RESOLVED, That this Company, by and through its President and Secretary, issue and deliver to the Twisp Mining & Smelting Company a certificate of stock for 250,000 shares in payment for all of its right, title and interest in and to the certain mining & personal property mentioned, the description and nature of which this Board has knowledge * * *" (St. 92).

"BE IT FURTHER RESOLVED, That this Company assumes liability for and hereby agree to pay all expenses incurred to date by said Robt. H. Strong and his associates, and all such expenses which may hereafter be incurred by him in connection with any of the matters or things referred to in the letter hereinbefore set out or in connection with any of the properties herein mentioned or with any of the business of the Company, and" (St. 92).

James O. Cull, in his capacity of a "Director" of the Board of Directors of the Chelan Mining Company, and one of the Assistant Secretaries and local Agent of said Chelan Mining Company went to the purported special meeting of the Board of Trustees of the Twisp Mining & Smelting Company, of date of January 30th, 1934 for the sole purpose of illegally procuring all the assets of the Twisp Mining & Smelting Company for the Chelan Mining Company through it's President, Robert H. Strong.

In *Contractor's Machinery & Storage Company* v. *Stewart*, 177 Wash. 263, 31 Pac. (2d) 546, the State Supreme Court, settled the law of this state, in regard to notice of a corporation of knowledge of it's agents, saying:

"The Bald Point Logging Company claims to have taken title to the property here involved by a bill of

sale from Stewart in payment of his stock subscription. The logging company was organized by Stewart and Keagy, as it's principal promoters, for the purpose of taking over the equipment at Bald Point Camp and conducting the logging operations then contemplated by them. Another of the organizers of the Company was Joe Downer. Stewart, Keagy and Downer were elected Trustees at the Stockholders' Meeting and Stewart was elected President and Keagy Secretary of the Corporation. * * *. These are the men who were the principal stockholders, trustees and officers of the appellant corporation, and it is hard to conceive how knowledge of the transaction could be brought home more forcefully to the corporation. The corporation was the creation and instrument of Stewart, Keagy and their associates. They should not be permitted, under the circumstances disclosed by the record here to appropriate other people's property, then organize a corporation under its control and take the property over and hold it from them, free from the consequences of their wrongful acts."

James O. Cull, admitted under oath on the trial of this matter in the Superior Court of Okanogan County, State of Washington, that he prepared the purported minutes of that pretended Special Meeting of the Board of Trustees of the Twisp Mining & Smelting Company of date of January 30th, 1934 as shown in Exhibit No. 7, that James O. Cull turned over to the New Secretary of the Twisp Mining & Smelting Company on April 5, 1939. (St. 183).

By examining these purported minutes of January 30th, 1934, that Mr. Cull prepared, which were not approved by any of the Trustees that were present, but which were simply "ATTESTED" by James O. Cull, as Secretary Pro Tem, there appears the following statements:

According to the purported minutes of the Board of Seven Trustees of the Twisp Company, which James O. Cull, as

"Secretary Pro Tem" of the Twisp Mining & Smelting Company prepared but which were never approved by any Member of said Board of Seven Trustees, inserted in those purported "Minutes", as follows:

> "A special meeting of the Board of Trustees of the Twisp Mining & Smelting Company, * * *, was held * * *, on the above date * * * (January 17, 1934), said meeting being held by consent in writing of a majority of the Trustees, which consent was filed with the Secretary of the Meeting." "James O. Cull was appointed as Secretary Pro Tem, in the absence of Harold Simonds, the Secretary of the Company."

The fifth member of the Board, which James O. Cull falsely claimed was a Board of Five Trustees, was neither notified of the holding of the Special Meeting of the Board of Trustees for January 30, 1934, nor was present at that purported meeting. John B. Hottel and Chas. W. Julian were Trustees of the Board of Seven Trustees of the Twisp Company, but resigned and John Goetz and Frederick C. MacDonald were elected in place of Mr. Hottel and Chas. W. Julian and James O. Cull claimed they had never qualified and, therefore, there were two vacancies on the Board of Seven Trustees, but Section 3803-31, Par. 1, of Rem. Rev. Statute (Sup.), provided that Mr. Hottel and Mr. Julian held office as Trustees until their successors were duly elected and qualified and, as a matter of law, there were no vacancies on the Board of Seven Trustees during the month of January, 1934.

James O. Cull testified:

> "I didn't send out formal notices for the January 17th, meeting" (St. 52) and further testified:
> "There was notice to the Directors that we recognized, "Except Roy K. Magney", who was absent * * *. Mr. Simonds' notice had been sent to him but so far as a notice as required under the By-Laws to hold a meet-

ing to act upon the questions then considered, *it was not a regularly called meeting.*" (St. 26)

James O. Cull, having admitted under oath, that the purported Special Meeting of January 17, 1934, was not a regularly called Special Meeting, he, as a Director of the Board of Directors and as one of the Assistant Secretaries of the Chelan Mining Company, admitted that there was no legal Special Meeting of the Board of Trustees, whether it was a Board of Seven or a Board of Five held on January 17, 1934.

But this same gentleman, who also prepared the purported minutes of the purported Special Meeting of the Board of Trustees of the Twisp Company inserted in those minutes, the following:

> "The Trustees present were John C. Sawbridge, C. M. Hull and W. V. Coons, being a majority of the Board of Trustees as now existing. Absent, Trustee Harold Simonds, who had executed written consent to the Trustees Meeting of January 17, *of which this meeting is an adjournment*, said consent being duly inserted and shown in the Minute Records of the Company. Absent, Trustee Roy K. Magney, to whom notice of this meeting was mailed as shown by the affidavit of mailing notices of the meeting heretofore inserted in the Minute Records of the Company."

And the undisputable fact is that James O. Cull never mailed Roy K. Magney any notice of the holding of the Special Meeting of the Board of Trustees for January 30, 1934, and this fact was not discovered until after January 1st, 1944. And a further fact is that James O. Cull never swore to the purported "Affidavit of Mailing Notices" and therefore that unsworn affidavit is no proof of such mailing and that, coupled with the fact that John C. Sawbridge's affidavit found in the Petition for relief filed in this cause

with the Clerk of the State Supreme Court on June 23, 1944 shows that he never signed said notice for the call of the Special Meeting of the Board of Trustees for January 30, 1934 and completely disputes James O. Cull's false testimony in this case.

"Yakima, Washington
January 30, 1934.

A Special meeting of the Board of Trustees of TWISP MINING & SMELTING COMPANY, a Washington Corporation, was held at Room 208 Holzinger Building in the City of Yakima, Washington on the above date at the hour of 2:00 o'clock P. M. *pursuant to notice duly given by the President, copy of which is inserted in the Minute Record preceding the Minutes of this meeting.* (Italics ours).

The Trustees present were John C. Sawbridge, C. M. Hull and W. V. Coons, being a majority of the Board of Trustees as now exist. Absent, Trustee Harold Simonds, who had executed written consent to the Trustee meeting of January 17, of which this meeting is an adjournment, said consent being duly inserted and shown in the Minute Records of the Company. Absent, Trustee Roy K. Magney, to whom notice of this Meeting was mailed as shown by the affidavit of mailing notices of the meeting heretofore inserted in the Minute Records of the Company.

Mr. Cull, as Attorney for the Company and Secretary pro tem of the meeting, reported that two vacancies existed on the Board of Trustees, by reason of the failure of John Goetz and Frederick C. MacDonald, who were elected as Trustees on August 15, 1932, to qualify by taking the Oath of Office; and he submitted to the members of the Board assembled the question as to whether the vacancies so existing should be filled at the present time, or the Board of five members, as now constituted, continue in handling the business of the Company."

James O. Cull, being examined by Counsel for the Chelan Mining Company, testified on the trial in the Superior Court of Okanogan County, State of Washington, that he was appointed by action of the Board of Five Trustees of the Twisp Mining & Smelting Company, as it's Assistant Secretary on January 17th, 1934 and continued as such "Assistant Secretary" from that time up until the meeting of April 5, 1939. (St. 165, 166).

He further identified Exhibit No. 10, as being the certified copy of the purported minutes of the purported special meeting of the Board of Trustees of the Twisp Mining & Smelting Company of date of January 30th, 1934, and swore said Exhibit 10 was a true copy of the original, which he prepared and inserted in Exhibit No. 7, and further testified:

> "Were you at that time Assistant Secretary of the Twisp Mining & Smelting Company?
> A. Yes, I had been so designated on the 17th." (St. 74).

In face of the purported minutes of the purported special meeting of January 17, 1934, that James O. Cull prepared himself, which show that James O. Cull merely acted at that "Informal Special Meeting of the Board of Trustees" as "Secretary pro tem in the absence of the regular Secretary, Harold Simonds" (See purported minutes attached to Exhibit No. 7, as proof of above facts).

Mr. Cull further inserted in the purported minutes of the purported informal special meeting of the Board of Trustees of date of January 30th, 1934, the following false statment:

> "Absent, Trustee Roy K. Magney, to whom notice of the meeting was mailed as shown by the affidavit of mailing notices of the meeting heretofore inserted in the Minute Records of the Company." (St. 184).

The purported Minutes of the purported special meeting of the Board of Trustees of the Twisp Mining & Smelting Company, which were prepared by James O. Cull, but never approved, show that James O. Cull was elected as Secretary pro tem and acted, but was not appointed as Assistant Secretary of the Twisp Mining & Smelting Company and there is no affidavit of James O. Cull of date of January 19, 1934, of the mailing of any notice to the Trustees for the holding of the purported special meeting of the Board of Trustees on January 30th, 1934, and that fact is further shown by James O. Cull, own testimony, to-wit:

There is attached to those purported minutes a purported copy of a purported "Notice of the Call of the purported Special Meeting of the Board of Trustees of the Twisp Mining & Smelting Company for January 30th, 1934", and attached to that copy of the purported "Notice" is a copy of the void "Resolution" of date of January 17th, 1934. However, there is no "Original Notice" inserted in the Minute Records, for the obvious reason, as later will appear, there never was any "Original Notice" made. Mr. James O. Cull testified:

"Q. Did you mail a copy of that notice and resolution to each of the five men whom you have just mentioned as constituting the Board at that time?
A. Yes I did.
Q. And did you mail this notice to Roy K. Magney at the address which you had ascertained?
A. Yes." (St. 184).
"Q. And then I believe you also testified that it was Mr. Cole's suggestion that you call a second meeting for January 30th?
A. Yes. I agreed with him it was the proper thing to do because I had not mailed formal notice of the other meeting and had gotten consent. *I had been through the early part of January trying to learn Mr. Magney's address to take up the question with him*

and was unable to get it until I received his address on the 24th of January, 1934—his office address in Denver. I mailed a notice to him on the 24th of January, 1934." (St. 183, 184) (Italics ours).

The purported copy of the purported "Call" of the purported special meeting of the Board of Trustees for January 30th, 1934, that James O. Cull inserted in the Minute Record proceedings the purported Minutes of the purported special meeting of the Board of Trustees of January 30th, 1934 *was manufactured by James O. Cull. That fact was discovered during the month of January, 1944.* John C. Sawbridge gave the Twisp Company on June 15, 1944, his affidavit wherein he swore he never signed any Notice for the "Call" of a special meeting of the Board of Trustees for January 30th, 1934 and never authorized James O. Cull to mail any Notices to anyone for that meeting.

John C. Sawbridge's statement to John L. Magney's agent, prior to the making of his affidavit, led John L. Magney, President of the Twisp Mining & Smelting Company, to order James O. Cull's file of letters, which had been stored in Denver, Colorado, to be forwarded to him, and when they arrived on June 5, 1934, John L. Magney found James O. Cull's original letter to Roy K. Magney of date of January 24, 1934, which was addressed to 725 United National Bank Building, Denver, Colo. which recites as follows:

> "I think we contacted a live wire in the person of Mr. Strong, of Portland, who, I believe is capable of financing the development of the property, if it will show up properly under rigid examination. Mr. Strong recently made us a proposition, that he would organize a new Company to take over the rights (?) which we hold and give the Twisp Mining & Smelting Company a 10% share in all the Capital stock of the new company. * * * We held an 'INFORMAL MEETING' here on the 17th and adopted a resolution in

form as per copy herewith, I told Mr. Strong, who was here at the time, that we would call and hold a regular meeting of the Trustees, informing him that there were only five active Trustees at the present time, to-wit, you and Sawbridge and Coons and Hull and Simonds; there being two vacancies on the Board which resulted in 1932, when Hottel and Julian resigned and we elected Mr. Goetz and his friend, MacDonald of Seattle. Neither of them ever qualified by taking the Oath of Office, although I wrote each of them two or three times about it. I wish you might be present at this meeting; but, probably because of distance, and the intangible value of our "mines," you will not feel justified in tearing away from your business there and making the trip. In any event, drop me a line; and if you are willing to join us in this venture, kindly sign the approval form below the copy of the Resolution, if you cannot attend the meeting; and send it to us, so that I may file it with the other papers. * * * Sincerely yours, James O. Cull" (R. 6).

That letter disputed James O. Cull's statement in the purported Minutes of the purported special meeting of the Board of Trustees of January, 30th, 1934, to-wit:

"A special meeting of the Board of Trustees of the Twisp Mining & Smelting Company, was held at Room 208, Holtzinger Building, in the City of Yakima, Washington on the above date (January 30th, 1934) at the hour of 2:00 o'clock P. M. pursuant to notice duly given by the President, copy of which is inserted in the Minute Records preceding the Minutes of this meeting. * * * Absent, Trustee Roy K. Magney, to whom notice of this meeting was mailed as shown by the affidavit of mailing notices of the meeting heretofore inserted in the Minute Records of the Company."

For the obvious reason that no President, and especially John C. Sawbridge, who was not the President at that time

of the Twisp Mining & Smelting Company ever signed any notice for the call of that special meeting of the Board of Trustees for January 30th, 1934 and it was absolutely impossible for James O. Cull to mail a copy of an instrument that never was made and James O. Cull's testimony to the effect that he did mail a copy of Notice for the call of a special meeting of the Board of Trustees for January 30, 1934, was absolutely false and untrue, and further James O. Cull's testimony that he was appointed by the action of the Board of Trustees, as Assistant Secretary, on January 17th, 1934 or any other time was false and untrue and proof of that fact is admitted by James O. Cull in the last paragraph of the purported minutes of the purported special meeting of January 30th, 1934, which James O. Cull prepared, to-wit:

> "Thereupon, the Secretary Pro Tem (Mr. James O. Cull) reported that Mr. Harold Simonds, the Secretary of the Company, has been absent from Yakima for some time, and that his absence from Yakima will continue for a considerable time in the future, and the question was submitted and considered as to whether an Assistant Secretary should be appointed with authority to act in all ways as Secretary of the Company during the absence of Mr. Simonds.
>
> Thereupon, upon motion duly made, seconded and carried by unanimous vote of all Trustees of the Company, the following Resolution was adopted:
>
> Whereas, Harold Simonds, Secretary of this Company, has been absent from Yakima for several months; and it is anticipated that said Secretary will continue to be absent for some time; and
>
> Whereas, for the purpose of executing the instruments referred to in the Resolution just adopted by the Board, and for other purposes incident to the business of the Company, it is desirable that someone in Yakima, Washington be empowered to act as Assistant Secre-

tary and to execute any and all instruments or papers on behalf of the Company, and to keep the minutes and Records of the Company;

NOW THEREFORE, BE IT RESOLVED, that James O. Cull, of Yakima, Washington, *who has heretofore acted, and is now acting, as Attorney for the Twisp Mining & Smelting Company*, shall be and is hereby appointed as Assistant Secretary of said Company, with full power and authority to act in all matters pertaining to the Company business, and in keeping its records and executing instruments of conveyance or legal papers of any kind, the same as a Secretary of the Company might, or could do if personally present; all until further order or direction of the Board of Trustees evidenced by entry thereof in the Minute Records of the Company; and

BE IT FURTHER RESOLVED, that specific power and authority are hereby granted to James O. Cull, as Assistant Secretary of the Company, to execute any and all instruments required by the Resolution for transfer of corporate property heretofore adopted at this meeting; and to affix thereto the corporate seal.

"There being no further business to come before the meeting, it was, upon motion duly made, seconded and carried, adjourned.

Attest:

President.

JAMES O. CULL,
Secretary Pro Tem"

James O. Cull, prepared a certified copy of those purported minutes of January 30, 1934, exhibit #10, and attached to same the following affidavit:

"STATE OF WASHINTON,
County of Yakima, ss.:

This certifies, That the attached and foregoing is a full, true and correct copy of the minutes of a special meeting of the Board of Trustees of Twisp Min-

ing & Smelting Company, a Washington corporation, duly and regularly held pursuant to notice given as required in the By-Laws, on the 30th day of January, 1934, at the office of the Company, in the City of Yakima, Yakima County, Washington, which said meeting was attended and participated in by three Trustees of the Corporation, to-wit., being a majority in number of all Trustees of the Corporation;

All as appears from the original files and records of said Corporation now in my possession.

Dated this February 1, 1934.

JAMES O. CULL,
Assistant Secretary of Twisp Mining and Smelting Company."

On the trial in Superior Court of Okanogan County, State of Washington, James O. Cull was examined by Counsel for Chelan Mining Company, and testified as follows:

"By Mr. Johnson: Q. I would like to identify an exhibit. Will you look at this exhibit, Chelan Mining Company's Exhibit #10 for identification. Look at it and state whether or not that is your signature. That purports to be a certified copy of the special meeting of the Board of Trustees held January 30, 1934? A. Yes that includes the minutes.
Q. Were you at that time Assistant Secretary of Twisp Mining & Smelting Company? A. Yes, I had been so designated on the 17th.
Q. I will ask you if Exhibit #10 is a certified copy of the minutes of that meeting which you sent to Mr. James Cole, Attorney at Portland, at his request? A. Yes.

Mr. Edelstein: * * *. Mr. Sawbridge purports to have signed the Minutes. * * *. John Sawbridge, President never signed the minutes.

Mr. Cull: I see Mr. Sawbridge's signature is not on the original." (St. 73, 74)

Mr. James O. Cull, in that "Certified Copy" of the "Purported Minutes" of the Special Meeting of the Board of Trustees of the Twisp Mining & Smelting Company of January 30th, 1934, certifies as true, to the following facts, to-wit:

1st. That he as "The Secretary Pro Tem" reported (to that purported meeting) that Mr. Harold Simonds, the Secretary of the Company, has been absent from Yakima for some time and that his absence from Yakima will continue for a considerable time in the future; and the question was submitted and considered as to whether an Assistant Secretary should be appointed with authority to act in all ways as Secretary of the Company during the absence of Mr. Simonds.

2nd. Thereupon, upon motion duly made, seconded and carried by unanimous vote of all Trustees of the Company, the following Resolution was adopted: * * *;

"Now, Therefore, Be It Resolved, that James O. Cull, of Yakima, Washington, *who has heretofore acted, and is now acting, as Attorney for the Twisp Mining & Smelting Company, shall be and is hereby appointed as Assistant Secretary of said Company, with full power and authority to* act in all matters pertaining to the Company business * * *."

"Be It Further Resolved, that specific power and authority are hereby granted to James O. Cull, as Assistant Secretary of the Company, to execute any and all instruments required by the Resolution for transfer of corporate property heretofore adopted at this meeting; and to affix thereto the corporate seal."

And he further admitted that "John Sawbridge's" signature was not on the original, and therefore his certificate was false in that regard. (St. 74) And further false in saying that the purported meeting of January 30th, 1934, was duly and regularly held pursuant to notice given as required in the By-Laws." For

the obvious reason as already shown, that no notice was mailed to Roy K. Magney, one of the Trustees, and of necessity under such facts there was no legal meeting held on January 30th, 1934, and James O. Cull was never at any time appointed as the "Assistant Secretary" of the Twisp Mining & Smelting Company and his testimony to the contrary was false and untrue.

Section 2586 of Remington's Revised Statute, provides:

> "The false making or forging of any instrument or writing purporting to have been issued by and in behalf of a corporation * * * and bearing the pretended signature of any person therein falsely indicated as an agent or officer of such corporation, * * * is forgery in the same degree as if that person were in truth such officer or agent of such corporation."

In this instant case, James O. Cull was one of the Directors of the Board of Directors and one of the Assistant Secretaries of the Chelan Mining Company and, as heretofore shown herein, he deliberately and knowingly gave perjured testimony in order to illegally obtain the assets of the Twisp Mining & Smelting Company and not only forged the certificate as "Assistant Secretary of the Twisp Company", but likewise "Forged His Name" to a quit claim deed, Exhibit No. 20, of date of January 31, 1934, and falsely represented that he was the "Assistant Secretary" of the Twisp Mining & Smelting Company, well knowing that he never was apointed as the Assistant Secretary of the Twisp Mining & Smelting Company at any time and had no authority to execute that quit claim deed as Assistant Secretary of the Twisp Mining & Smelting, and under the provisions of Section 2586 of Remington's Revised Statutes, that Quit Claim Deed was, in fact and in law, a "Forged Quit Claim Deed" and did not constitute a legal act of the Twisp Mining &

Smelting Company, but was, in truth and in law, the illegal act of the Chelan Mining Company.

> In Thompson, on Corporations (2nd ed.) page 729, Section 1645, it provides: "The general rule is that notice of a fact acquired by an agent, while transacting business of this principal, operates constructively as notice to his principal. As corporations, from their nature, can never act except through the instrumentality of their agents or their property, this principle applies with peculiar force to them. * * *. Where knowledge in and form will suffice, a corporation must be held to know what its President and chief officers know, since "a corporation cannot see or know except by the eyes or intelligence of its officers. * * *" And Section 1646, page 729, further provides: "Broadly speaking, the rule as to charging corporations with knowledge of their officers and agents is that notice communicated to, or knowledge acquired by, the officer or agent of a corporation, when acting in their official capacity or within the scope of their agency, becomes notice to or the knowledge of the corporation, and is binding upon it."

In *Almo Trust Company* v. *Cunningham* (*Tex.*), 203 S. W. 1105, the Court held:

> "The forged deed could not affect the title to the land, and was therefore not entitled to record. The provisions of the statute as to deeds being void as to subsequent purchasers, without notice, if not recorded, have no application to forged deeds. Reliance on a recorded forged deed may bring loss on him who so relies, but it cannot affect the rights of the owner of the property. A man cannot be deprived of his property by a forged deed, no matter in what good faith the party acted who claims under it. The forged instrument is as absolutely void and ineffective as though it had never existed."

In *Lewis* v. *Kuyawa*, 158 Wash. 607, 617, 291 Pac. 1105, the Supreme Court of the State of Washington held:

> "It is unquestionably the general rule that one holding under a forged instrument, however ignorant he may be of the forgery or how much of value he may have parted with in reliance of the genuineness of the instrument, cannot claim protection against the title of the rightful owner. As some Courts have said, it would be a monstrous doctrine to hold one, by forging a deed of his neighbor to himself could in any way affect the title of his neighbor." See Commonwealth v. Wilson (Ky.), 12 S. W. 264, on same subject matter.

In this regard on page 270 of the Opinion of the State Supreme Court, the writer of the Opinion says:

> "It may be stated that this case was not presented to this Court by the same Counsel who tried the case for appellant, and we assume that the briefs were not prepared by Counsel who tried the case. We make this statement for the reason that Counsel on behalf of appellant in this Court makes some claim that the deed executed on behalf of appellant on January 31, 1934, was a forgery. No such claim or contention was made in the lower Court; in fact no contention was made in the lower Court that the then Directors of appellant, or Strong, or the Chelan Mining Company, acted other than in good faith. The case was tried by appellant purely upon the theory that there was no quorum of the Directors present on January 17, or January 30th, 1934, authorized to pass the resolution, and that, therefore, the resolution passed on January 17, and adopted on January 30, was null and void. We therefore cannot consider the claim now made in this Court that the Deed was a forgery."

That statement was not true, but was in fact taken from the Respondent's Answer Brief on the appeal and is dis-

puted by the Trial Judge in his Memorandum Decision of January 7, 1941, to-wit:

> "In fact the plaintiff alleges that the agents and managing officers of the Chelan Mining Company participated in and were accessories in those unlawful and illegal proceedings carried on in January, 1934, when ostensibly the properties of the plaintiff were conveyed to the defendant, Chelan Mining Company * * * This being the situation, I must look upon the complaint as being a single purpose effort to set up invalidity in the conveyance attacked on the sole grounds that it was consummated without any authority and was not binding of the Twisp Mining & Smelting Company, the plaintiff herein, and that all the allegations in the complaint to the effect that the officers and agents of the Chelan Mining Company aided, abetted, cajoled and induced the officers and agents of the plaintiff in the illegal perpetrations, are to be taken and considered merely for the purpose of showing that the Chelan Mining Company had notice all along of the invalidity and unholy character of the color of title which it acquired." (St. 341, 342)

And there is now an affidavit of a stockholder in this record, showing that the forged deed was argued in the brief that was served on each of the defendants, with written acceptance of service by each Counsel for Defendants, and argued in open Court before the Trial Judge, conclusively showing that question of the forged Deed was raised in the lower Court and the position of the State Supreme Court is therefore not well taken. (See R. 19)

This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed to have been perjured. Here, even if we consider nothing but Mr. Cull's sworn admissions, we find a deliberate planned and carefully executed scheme to defraud the Appellant and the Courts of the State of Wash-

ington as well, and proof of the scheme, and of its success up to date is conclusive.

The "Appellees" wrongfully induced the State Supreme Court to hold that a legal resolution for the transfer of all of the assets of the Twisp Mining & Smelting Company could legally be passed at an "Informal Special Meeting" of its Board of Trustees, when even considering that the Board at that time was a board of five, only four of the Board were notified of the holding of the special meeting and the fifth Trustee was not even notified of the holding of the special meeting and was not present on January 30th, 1934, when that purported special "Informal Meeting" was held and further induced the State Supreme Court to hold that those four Trustees had authority to authorize anyone to execute a Deed in the name of the Twisp Mining & Smelting Company whereby all the assets of the Twisp Mining & Smelting Company could be legally transferred to Robert H. Strong for the Chelan Mining Company in face of Article II, Section 5 of the By-Laws of the Twisp Mining & Smelting Company, which provides:

> "Special meeting of the Board of Trustees shall be held whenever called by the President, or by one-third of the Trustees for the time being in office. The Secretary shall give notice of each special meeting by mail, * * *, to each Trustee; * * * ".
>
> And the decision, in Burch v. National Guarantee Credit Corporation (Del.), 116 Atl. 738, which holds: "Unless notice be given to each Director, as required by By-Law of the Corporation, the meeting is illegal, and action taken is not binding."
>
> And these Officers and Agents of the Chelan Mining Company further wrongfully induced the State Supreme Court to find that a Notice of that special meeting of the Board of Trustees of January 30th, 1934, signed by John C. Sawbridge, as President, was mailed to each Trustee on January 19, 1934, when no such signed notice ever existed and no copy of a purported

notice of the call of the purported special meeting of a Board of Trustees could be mailed to the Trustees by James O. Cull, one of the Directors, and one of the Assistant Secretaries and local agent of the Chelan Mining Company, when John C. Sawbridge swears that no such notice was ever signed by him, and without a bona fide notice existing, James O. Cull's testimony that he mailed a true copy to Roy K. Magney was false and untrue and the Chelan Mining Company is chargeable with the knowledge of its own officer who made that false statement under oath to mislead the State Supreme Court.

On page 281, of the Court's Official Opinion, 16 Wash. (2d) 264, 133 Pac. (2d) 300, of the *Twisp Mining & Smelting Company* v. *Chelan Mining Company*, the Court said:

> "Mr. Strong formed the Chelan Mining Company, pursuant to his agreement with Twisp; and after the conveyance by Mr. Strong and wife to the Chelan Mining Company, that Company issued to Twisp 250,000 shares of its stock, which was delivered to Mr. Cull and receipted for by him. *Twisp still holds this stock.*"

It must be remembered, as already shown herein, that James O. Cull was never the "Assistant Secretary" of the Twisp Company or any other officer, he was merely the Attorney of the Twisp Mining & Smelting Company, and it is held in *Lexington Gold Min. Co.* v. *Jefferson Min. Co.* (Colo.) 66 Pac. 677, on similar facts as this instant case, to-wit:

> "As proof of acceptance by the plaintiff of any deed, the foregoing evidence is a failure. It proved that Mr. Morrison, who was inferentially the legal advisor of the plaintiff, was himself satisfied with the deed of September 14th, and felt sure it would be accepted by the plaintiff. But merely as Counsel for the plaintiff he could not accept the Deed for it, or bind it by saying it would be accepted. He could advise the acceptance of

the Deed, but the plaintiff was at liberty to disregard his advice. It appears from the evidence that it did disagree with him, and refused to take the Deed, and that he so advised Mr. Jones. The defendant did not make even a prima facie case."

"Q. Did you (Mr. Cull) ever inform either of the Magneys of the receipt of the shares in the Chelan Mining Company? Did you inform the Magneys that you had that certificate? A. I couldn't say specifically they knew that I had it." (St. 51, 52)

James O. Cull testified that he attended the stockholders meeting of the Twisp Mining & Smelting Company that was held on April 5, 1939, and that he had with him the bunch of minutes "Exhibit No. 7" and that he turned them over to K. H. Blaesser, who became the new Secretary and that he then informed the new Secretary and one of the Magneys that he had the certificate of stock for 250,000 shares of the Chelan Mining Company's stock and that Mr. Blaesser informed him at the time, he didn't know whether they wanted to take it, but would inform him later on, and that later on Mr. Cull got the information or idea that the Twisp Mining & Smelting Company didn't want to accept the certificate and that Mr. Cull just continued to hold the stock and Mr. Cull never delivered that certificate of stock to the Twisp Mining & Smelting Company (St. 55, 56) clearly showing the statement of the State Supreme Court "Twisp still holds this stock" was not true.

Exhibit No. 44 was introduced by Mr. Gillespie, as proof of the fact that the "Executory Sale Contract" of date of November 23, 1927, made by the Alder Group Mining & Smelting Company, as a defacto corporation with John L. Magney for the sale of the three patented mining claims had been cancelled, when the Exhibit No. 4 itself shows there never was any cancellation of said "Executory Sale Contract" obtained by that pretended lawsuit.

Notwithstanding that it was adjudicated in the receivership action, that the attempt of the two surviving Trustees of the Alder Group Mining Company, to engage in new business on behalf of the defunct corporation under a pretended contract with the Chelan Mining Company and a purported lease with Mahlon McCain and Chas. W. Gillespie, was absolutely null and void, as shown in Exhibit No. 57, the Receiver illegally induced the Trial Judge to exceed his statutory power under Section 3803-53 of Remington's Revised Statutes (Sup.) and grant the Receiver to do that which had already been adjudicated he had no power to do. See *Gamble* v. *Alder Group Mining & Smelting Company, et al.*, 5 Wash. (2d) 578, 105 Pac. (2d) 810 *supra.*

This matter does not concern only private parties. There are issues of great moment to the public in a mining case and tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with good society. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

In *Davidson* v. *Hewitt*, 6 Wash. (2d) 131, 137, 106 Pac. (2d) 733, 736, the Court held:

> "Mere suspicion of wrong is not discovery of the fraud, nor is it a clue which respondent should have followed. Respondent may have been too trusting, but there is no showing of a lack of diligence on his part in detecting the fraud. The discovery contemplated by the statute (Rem. Rev. Stat. #159, subd. 4) is of evidential facts leading to the belief in the fraud and by which the existence of the fraud may be established. There is not, until 1939, a discovery of such fact as would, on reasonably diligent investigation,

> have led to knowledge of the fraudulent transfer; hence there was not, until 1939, discovery of the fraud."

So in this instant case, it was not until January, 1944, that it was discovered that James O. Cull never mailed any "Notice" of the call of the special meeting of the Board of Trustees for January 30th, 1934, to Roy K. Magney, one of the Trustees, and further discovered that John C. Sawbridge never even signed any notice for the call of that meeting and that the Chelan Mining Company and one of its Assistant Secretaries had perpetrated a gross fraud upon the Trial Court and the State Supreme Court of the State of Washington by reason of their false testimony, which was introduced to deliberately and intentionally obtain all the assets of the Twisp Mining Company without due process of law and without any consideration to the Twisp Mining & Smelting Company.

Grounds Upon Which It Is Contended the Questions Involved Are Substantial

The Twisp Mining & Smelting Company is a corporation, existing by virtue of the laws of the State of Washington, and being a creature of law, whose life is dependent upon the provisions of law, must be governed strictly by those provisions of the law as provided by Section 3803-31, paragraph 1, of Remington's Revised Statutes of 1933, (Sup.) of the Uniform Business Corporation Act, which went into full force and effect on January 1, 1934, which provides:

> "* * * A director (or Trustee) shall hold office for the term for which he was named or elected and until his successor is elected and qualified."

In this instant case, it is claimed by Appellees that John B. Hottel and Chas. W. Julian, resigned as trustees on August 15, 1932, and that John Goetz and Frederick C.

MacDonald were elected in their place and stead and by reason of these two newly elected Trustees failure to qualify as Trustees there were two vacancies on the Board of Seven Trustees during the month of January, 1934, in strict violation of Section 3803-31, paragraph 1 of Rem. Rev. Stat., of 1933, (Sup.) and the State Supreme Court upheld that view and denied the Twisp Mining & Smelting Company the equal protection of that law which provides that, although John B. Hottel and Chas. W. Julian had resigned, they still remained Trustees until their successors were duly elected and duly qualified and, therefore, there were no vacancies on the Board of Seven Trustees of the Twisp Mining and Smelting Company during the month of January, 1934.

The State Supreme Court was led into error by reason of its failure to read James O. Cull's sworn testimony that the purported special meeting of the Board of Trustees of the Twisp Mining & Smelting Company of January 17th, 1934, was not a regularly called special meeting, and in holding that the purported special meeting of the Board of Trustees of the Twisp Mining & Smelting Company of January 30th, 1934, was a regularly called meeting, when as now discovered the same condition that existed in reference to the purported special meeting of January 17th, 1934, existed as to the purported special meeting of January 30th, 1934, to-wit: No Notice of the holding of the special meeting of the Board of Trustees for the 30th of January, 1934, was ever given to Roy K. Magney, and therefore, as a matter of law, no legal special meeting of the Board of Trustees of the Twisp Mining & Smelting Company was ever held on January 30th, 1934, and no legal resolution could have been passed as a matter of law.

The Constitution of the United States being what it is, it is obvious that the entire proceedings of these appellees have been in direct violation of the Fourteenth Amendment to the Constitution of the United States and therefore there

is a "Federal Question" vitally important to the entire corporate practice in the United States, and that question is involved on this appeal and calls for the supervision of this Court to protect the stockholders' rights in the Appellant corporation, from being deprived of their property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States and it is manifest, then, that the grounds presented by this Appellant to this Court for a review of this case are substantial.

Manner in Which Federal Questions Were Raised

The Federal Questions, here involved, were first raised to the trial Court, by the pleadings, as stated by the Trial Judge in his Memorandum of January 7, 1941, in ruling on the defendant's demurrers to the plaintiff's complaint where the Trial Judge said:

> "It is plain from the allegations of the complaint * * * that the plaintiff is seeking to stand squarely on the proposition that the actions of the Trustees of the plaintiff in January, 1934 *were wholly without authority and therefore did not bind the plaintiff corporation, and the illegal character of the performance was known to the officers and agents of the Chelan Mining Company—in fact the plaintiff alleges that the agents and managing officers of the Chelan Mining Company participated in, and were accessories in those unlawful and illegal proceedings carried on in January, 1934, when ostensibly the properties of the plaintiff were conveyed to the defendant, Chelan Mining Company.* * * *This being the situation I must look upon the complaint as being a single purpose effect to set up invalidity in the conveyance attacked on the sole grounds that it was consummated without any authority and was not binding on the Twisp Mining & Smelting Company, the plaintiff herein,* and that all the allegations in the complaint to the effect that the officers and agents of the

> Chelan Mining Company aided, abetted, cajoled and induced the officers and agents of the plaintiff in the illegal perpetration, are to be taken and considered merely for the purpose of showing that the Chelan Mining Company had notice all along of the invalid and unholy character of the color of title which it acquired." (Italics ours)

In other words, the Trial Judge held that as he interpreted the allegations of the Plaintiff's complaint, the purported Deed of January 31, 1934, made in the name of the Twisp Mining & Smelting Company, by John C. Sawbridge, as President and James O. Cull, as Assistant Secretary, was made wholly without authority of the Twisp Mining & Smelting Company and that it did not bind the Twisp Mining & Smelting Company.

Section 2586 of Remington's Revised Statutes of the State of Washington, provides:

> "The false making or forging of any instrument or writing purporting to have been issued by or in behalf of a corporation * * * and bearing the pretended signature of any person therein falsely indicated as an agent or officer of such corporation, * * *, is forgery in the same degree as if that person were in truth such officer or agent of such corporation."

In *State* v. *Fay* (Minn.), 83 N. W. 158, 159, the Court held in a criminal case on the question of forgery:

> "A 'Check' was signed 'P. McDonald, by John McDonald' and was held to be a forgery. The writing alleged to be forged purports on its face to have been executed by P. McDonald by John McDonald. Hence, it appears on the face of the instrument that, if it was genuine, it would possess legal efficiency as an order of P. McDonald for the payment of money. Therefore, a representation that John McDonald was authorized to execute it for P. McDonald. Now, when the defendant uttered the instrument as true, knowing it to

> be forged, he thereby represented and affirmed that the agent purporting to execute it for his principal had authority to do so. He is bound by his own representations, and it is unnecessary to allege in the indictment or prove on the trial such agency. Were it otherwise, all that it would be necessary for the party putting off forged paper to do in order to escape conviction would be to deal in such paper only as purported on its face to be executed by an agent for his principal, but who had no authority to represent the principal in any case."

In *Almo Trust Company* v. *Cunningham*, 403 S. W. 413, 414, the Court in the State of Texas held:

> "The forged deed could not affect the title to the land, and was therefore not entitled to record. The provisions of the statute as to deeds being void as to subsequent purchasers, without notice, if not recorded, have no application to forged deeds. Reliance on a recorded forged deed may bring loss on him who so relies, but it cannot affect the rights of the owner of the property. A man cannot be deprived of his property by a forged deed, no matter in what good faith the party acted who claims under it. The forged instrument is as absolutely void and ineffective as though it had never existed."

The act of forging a deed or other instrument is an illegal act, and *Colby* v. *Title Insurance & Trust Company* (Cal.), 117 Pac. 915, 918, in passing on the validity of a deed that was obtained by an illegal act, held:

> "The doctrine of estoppel by conduct or by latches or even ratification, has no application to a contract or other instrument which is void, because it violates an express mandate of the law and dictates of public policy. Such a contract or instrument has no existence whatever for any purpose, and neither action or inaction of the parties to it can validate it; and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity."

And in *Lewis* v. *Kuyawa*, 158 Wash. 607, 617, 291 Pac. 1105, the Court said:

> "It is unquestionably the general rule that one holding under a forged instrument, however ignorant he may be of the forgery or how much of value he may have parties with in reliance on the genuineness of the instrument, cannot claim protection against the rightful owner. As some Courts have said, it would be a monstrous doctrine to hold one, by forging a deed of his neighbor to himself could in any way affect the title of his neighbor."

Counsel for the Receiver and Counsel for the Methow Gold Corporation, Appellees, herein, and Counsel for the Respondents in the State Supreme Court falsely stated to the State Supreme Court in their briefs on that appeal, as follows:

> Receiver's claim was: "In view of a very peculiar position by substitute Counsel for appellant in their opening brief in injecting the suggestion about a "FORGED DEED", it may be proper to point out that up to the time the brief was served, there had never been a charge of fraud, misconduct or intentional improper act on the part of any trustee or officer of the Twisp Mining & Smelting Company, *or on behalf of any other party to the litigation.* The complaint was drawn and the case tried solely on the theory that the lack of quorum rendered the proceedings void as a matter of law. *Certainly the Court will not permit the injection of any such claim into the case on appeal.* (Italics ours.)
>
> The Methow Gold Corporation falsely claimed: "In reply to the charge of forgery set forth in the briefs submitted by Appellant, we are prone to believe that that is the brain child of W. B. Mitchell, the clerk employed by Attorney W. G. Boland. There is no mention of forgery in the Trial Court and no argument about forgery before the Trial Court. Consequently, Judge

> Brown, the Trial Judge, would be surprised to learn there was an allegation of forgery in this case."

And by reason of those false statements of Counsel for the Appellees, the State Supreme Court in its Opinion at page 270 of the official printed Opinion, in 16 Wash. (2d) 264, 133 Pac. (2d) 300, held:

> "It may be stated that this case was not presented to this Court by the same Counsel who tried the case for the Appellant and we assume that the briefs were not prepared by Counsel who tried the case. We make that statement for the reason that Counsel on behalf of Appellant in this Court makes some claim that the Deed executed on behalf of Appellant on January 31, 1934, was a forgery. No such claim or contention was made in the lower Court that the then Directors of Appellant, *or Strong, or the Chelan Mining Company*, acted other than in good faith. *The case was tried by Appellant purely upon the theory that there was no quorum of the Directors present on January 17, or January 30, 1934, authorized to pass the resolution and that therefore the resolution passed on January 17, and adopted on January 30, was null and void.* We therefore cannot consider the claim now made in this Court that the Deed was a forgery." (Italics ours.)

In the *First Place*, the Rules of the State Supreme Court require the "Appellant" and the "Respondents" to make statement of the questions involved on the appeal. In this instant case, one of the questions involved as claimed by appellant, was:

> "Can three members of a Board of Seven Trustees of a private corporation *AT AN INFORMAL GATHERING* legally represent that corporation, or legally transact any business of any kind of that corporation or pass any resolution of any kind that will bind that corporation? Trial Court, in substance, answered 'yes'."

The Respondent, Chelan Mining Company, claimed the question involved was:

"Where articles of incorporation provide for a Board of Seven Trustees, and the By-Laws also provide that a majority of the Trustees, for the time being in office, shall constitute a quorum, is the action of three *at a regularly called meeting* and at a time wherein there are only five qualified and acting Trustees in office binding on corporation? The Trial Court answered in the affirmative."

Those two questions, show that the "question" of the "Forged Deed" was raised to the Trial Court, because the "Appellant's" question was whether three members of a Board of Seven Trustees had any power to transact any business of the corporation or pass any resolution of any kind at an informal gathering of three Trustees.

The State Supreme Court in Trethwey v. Green River Gorge, 17, Wash. (2) 697, 136 Pac. (2d) 1011, and in Twisp Mining & Smelting Company v. Chelan Mining Company et al., 16 Wash. (2d) 264, 133 Pac. (2d) 300, holds the law of the State of Washington is that a Board of Trustees of a corporation in the State of Washington can act only at legal meetings, but the State Supreme Court in this instant case adopted the false position of the Appellees and said:

"The meetings of January 17 and 30, 1934, were regularly called special meetings." When the testimony of the Chelan Mining Company's own officer clearly shows that neither of said purported meetings were regularly called meetings, but on the contrary, were simply "*Informal Gatherings*" where no business of the corporation could legally be transacted as a matter of law.

There is also an affidavit in the Appellant's Petition to the State Supreme Court for leave to file its Petition in the Superior Court of Okanogan County for relief from the judgment that was obtained by gross fraud of the Defend-

ants and by the knowing use of perjured testimony, which is not denied, showing:

> "That the question of the "Forged Deed" was raised in the Trial Court in Appellant's brief on Appellant's Motion to re-open the case for further evidence and a reconsideration of the Trial Court's Memorandum Decision of February 5, 1942, and a copy of that brief was served on each of the Counsels for Defendants, and each of them accepted service of same in writing and one of the Counsels for the Twisp Company argued the question of the "Forged Deed" to the Trial Court in the presence of said Defendants Counsel and, therefore, the statements of Counsel to This State Supreme Court that the question of the "Forged Deed" was not raised in the Trial Court were absolutely false and untrue and known to be false when made for the evident purpose of obstructing the due administration of law and justice to the Twisp Mining & Smelting Company and its stockholders, by unlawfully preventing the State Supreme Court from passing on the question of the forged Deed, which was one of the vital issues on said appeal.

Therefore that transaction comes within the ruling of the *Hotaling* v. *Hotaling* case (Cal.), 224 Pac. 425, 438:

> "By the resolution adopted by the remaining four, the President and Secretary were authorized to execute a Deed of conveyance to Richard M. Hotaling, one of the members of the Board present, of real estate belonging to the corporation. The Deed was executed and recorded. The Question of the validity and effect of the Deed formed the subject matter of this action. The Trial Court held the Deed was void and the Appellate Court affirmed the Trial Court's ruling and in doing so, used this language: * * * 'the claim under which Richard M. Hotaling claims as an attempted corporate act, must, we think, be conceded to have been invalid from its inception for the reason that its execution was never effectively authorized by the Board of Directors

in whom was vested the sole power to give such authorization."

In this instant case, James O. Cull claims that the Board of Trustees of the Twisp Mining and Smelting Company adopted a void resolution that was unlawfully attempted to be passed at a purported Special Meeting of the Board of Trustees of date of January 17, 1934, which everyone present at that purported Special Meeting admitted was illegally held. This same Mr. Cull falsely swore that John C. Sawbridge signed a purported call for the holding of another special meeting of the Board of Trustees to be held on January 30th, 1934, to correct the mistake that occurred in regard to the purported Special Meeting of the Board of Trustees of date of January 17th, 1934, but John C. Sawbridge, as already shown, swore under oath that he never signed any notice for the call of that purported Special Meeting of the Board of Trustees of the Twisp Mining & Smelting Company and as a matter of fact there is no such signed notice in existence and James O. Cull's testimony was absolutely false and untrue and known by Mr. Cull to be false and untrue when he gave such testimony and, therefore, as a matter of law, there being no original notice signed by John C. Sawbridge, there could have been no notice mailed to Roy K. Magney and Roy K. Magney was absent from the purported "Informal Special Meeting" of the Board of Trustees of date of January 30th, 1934, and there was no legal meeting of the Board of Trustees held on that date and, of necessity, there could not be any legal adoption of resolution at that Informal Special Meeting as a matter of law and there was not, and could not be, any legal authorization given at that Informal Special Meeting to either John C. Sawbridge or James O. Cull to execute any Deed and John C. Sawbridge's and James O. Cull's signatures placed on that purported Deed of January 31, 1934, under the provi-

sions of Section 2586 of Rem. Rev. Statutes of the State of Washington, were forgeries and were made on behalf of James O. Cull to purport a gross fraud on the Trial Court and the State Supreme Court for the sole purpose of illegally obtaining all the assets of the Twisp Mining & Smelting Company without legal authority and without any consideration therefor.

The question of the "Forged Deed" was raised in the Trial Court in Appellant's written briefs, on Appellant's Motion to re-open the case for admission of two exhibits and to reconsider the Court's Memorandum of February 5, 1942, on the merits, and a copy of the written brief was served on each Counsel for the Defendants and each Counsel for Defendant accepted service of same in writing and one of the then Counsels for the Twisp Mining & Smelting Company argued the question of the forged Deed to the Trial Judge in the presence of Counsels for Defendants and the statements of Counsel for the Appellees to the State Supreme Court that the forged Deed was never raised in the Trial Court is, and was, absolutely false and untrue and known to be false and untrue when made for the sole and only purpose of obstructing the due administration of the law to the Twisp Mining & Smelting Company.

And the Trial Judge, in the absence of Appellant or its counsel on February 25, 1942, entered a final judgment, and found, and decided in said Judgment & Decree as follows:

> "Now in accordance with said Memorandum Decisions (of February 5, and February 25, of 1942) the Court finds and decides that the Deed dated January 31, 1934, wherein the Plaintiff, the Twisp Mining & Smelting Company, war grantor and Robert H. Strong was Grantee, which Deed was filed for record on the 21st day of February, 1934, in Book 77 of Deeds at page 625 in the office of the County Auditor of Okanogan County, State of Washington, is valid in all respects;

that the execution of said Deed was authorized by the vote of the majority of the Board of Directors of the Twisp Mining and Smelting Company at a meeting which had been duly and regularly called and at which a quorum was present; that said Deed is valid and binding on the Plaintiff, and that Plaintiff, by reason of said conveyance by it and by reason of having ratified and confirmed said Deed and by reason of estoppel and latches cannot prevail in this action, and that its said action should be dismissed; and Plaintiff's motion for new trial having been denied; Now, therefore, it is ORDERED, ADJUDGED AND DECREED that the Plaintiff take nothing by its said action and said action is hereby dismissed with prejudice, * * * Done in Open Court this 25th of February, 1942. Wm. C. Brown, Judge." (Tr. 138, 139)

That Judgment was entered by Hon. Wm. C. Brown, with positive knowledge that said Defendants in open Court dismissed any right to affirmative relief, and still the Trial Judge dismissed the Plaintiff's action with prejudice, which is in law affirmative relief (St. 357). And the said Defendants in the Lower Court and Appellees in the State Supreme Court practiced fraud upon the State Supreme Court when they, after dismissing any right to affirmative relief in the Lower Court, insisted upon their so-called affirmative defenses on the appeal to the State Supreme Court under the authority of *Seeley* v. *Gilbert,* 16 Wash. (2d) 611, 134 Pac. (2d) 710 under the statutes of the State of Washington, in a case like this instant case, as held in *Haaga* v. *Saginaw Logging Co.,* 170 Wash. 93, 15 P. (2d) 655, is granted power to make an order upon the "Original Application" of an aggrieved party, permitting the aggrieved party to petition the Superior Court where the trial was originally held, for a new trial, or in the alternate, to file a motion with the Trial Court to re-open the case for further evidence as

held in *White* v. *Donini*, 173 Wash. 34, 21 Pac. (2d) 265, to-wit:

> "Two questions are presented by the petition (That is the Original Petition like the one presented to the State Supreme Court in this instant case): (1) Has this Court jurisdiction to grant the Trial Court permission to hear the two motions presented by the Petition? And (2) If this Court has jurisdiction, is this a proper case for its exercise? That the Court has such power is beyond question; under our decisions. Haage v. Saginaw Logging Co., 170 Wash. 93 15 P. (2d) 655, State ex rel. Cross v. Superior Ct. 158 Wash. 46, 51, 290 Pac. 430; In re Shilshole Avenue, 101 Wash. 135, 172 Pac. 338. The present writ did not subscribe to the prevailing opinion in the recent Haaga Case, but expressed his dissent therefrom. The dissent was based upon the grounds that the evidence therein, on which a new trial was sought, was not, 'newly discovered', but 'newly created'. That is, that it was evidence of a condition that had arisen long after trial and judgment, and furtner, that it was not shown that any fraud had been practiced in securing the verdicts. The case at bar not only falls within the rule in the Haaga case, but also excapes the disapproval voice in the dissent. The evidence here sought to be introduced is not only newly discovered, but raises a question of false testimony."

Referring to the case entitled, *In Re Shilshole*, 101 Wash. 135, 172 Pac. 338, the question of when the year statute provides to bring the action for relief, began to run and it was held that it did not begin to run until all appeals permitted by law were duly ended and in this instant case, the mandate from the United States Supreme Court having been filed with the Clerk of the State Supreme Court on January 24, 1944, the year would begin to run from that date, and the Original Petition for relief was duly filed with the Clerk of the State Supreme Court in this instant case on June 23, 1944, within the time allowed by law.

The Constitution of the State of Washington under Article IV, Section 2, pertains to the duties of the Supreme Court and provided:

> "In determination of causes, all decisions of the Court shall be given in writing, and the grounds of the decision shall be stated."

The Petition of Appellant for relief to the State Supreme Court was set down for hearing for Friday, July 21, 1944, the Respondents did not deny any of the allegations of the Twisp Company in said Petition and Clyde G. Jeffers, who wrote the original opinion of the State Supreme Court, presided as Acting Chief Justice, and refused to allow Counsel for the Twisp Company more than 15 minutes to present the Twisp Company's case and merely entered in the Motion Docket the words:

> "Motion to present to Superior Court, petition for new trial or in the alternate petition to re-open the case for additional evidence. DENIED.
>
> (Signed) Clyde G. Jeffers, Actg. Chief Justice." Without writing any opinion or stating any grounds for said denial as provided by the State Constitution it was his duty to do.

A Petition for rehearing was duly filed within the time allowed by law and on August 29, 1944, Clyde G. Jeffers, acting as Chief Justice, entered an order, without any written Opinion which provides:

> "The Court having considered the Appellant's petition for a rehearing of its "Petition for Leave to Present to the Superior Court its Petition for a new trial or, in the alternate, a Petition to Re-open Case for Additional Evidence,"
>
> IT IS ORDERED that the Petition for Rehearing be and the same is hereby denied. Dated this 29th day of August, 1944:
>
> By the Court: CLYDE G. JEFFERS,
> *Acting Chief Justice.*

And the Twisp Mining & Smelting Company was denied a substantial right without a hearing within the meaning of the Fourteenth Amendment to the Constitution of the United States under the ruling in *Powell* v. *Alabama*, 287 U. S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed., 54, 84 A. L. R. 527.

And in *Harry Pyle, Petitioner*, v. *State of Kansas and Milton P. Matine, Warden of Kansas Penitentiary*, 317 U. S. 213, 216, 87 L. Ed. 214, 216, in a *Habeas Corpus* case, for relief of an improper conviction, the Court held:

> "No return was made to the application for the writ. On December 11, 1941, the Court below entered an order "that said petition be filed and docketed without costs, and thereupon, after due consideration by the Court, it is ordered that said petition for the writ of habeas be denied." *There was no* opinion. A motion to re-hear was also denied without opinion. We brought the case here on certiorari, 316 U. S. 654, 86 L. ed. 1734, 62 S. Ct. 1045, because of the constitutional issue involved.

Cases Believed to Sustain Jurisdiction of This Court

Mooney, Petitioner v. *Holohan, Warden*, 294 U. S. 103, 79 L. Ed. 791, 794, as quoted in *Jones* v. *Commonwealth of Kentucky*, 97 Fed. (2d) (6th C. C. A.) 335, at 338, where it holds that a criminal conviction obtained by the knowing use of perjured testimony must, with equal abhorence be condemned, as a traversy and in addition to the foregoing cases this Court in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 88 U. S. Laws Advance Opinions, 936, held:

> "Federal Courts, both Trial and Appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgment was finally entered, Brownson v. Schulten, 104 U. S. 410, 26 L. ed. 797. * * * This is not meant, however, that a judgment finally entered has ever been regarded as completely

immune from impeachment after the term. From the beginning there existed along side the term rule of equity to the effect that, under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. (Cases Cited) This equity rule, which was firmly established in English practice long before the foundation of our Republic, the Courts developed and fashioned to fulfill a universal recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from the rigid adherance to the term rule. * * *. Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulent begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the patent office, but the Circuit Court of Appeals. Cf. Marshall v. Homes, 141 U. S. 589, 33 L. ed. 870, 12 S. Ct. 62, Supra. Proof of Scheme and its complete success to date, is conclusive."

In this instant case, James O. Cull, was manifestly acting solely for the interests of the Chelan Mining Company. He had no further interest in the Twisp Mining & Smelting Company or its stockholders. He was a Director of the Board of Directors of the Chelan Mining Company and one of its Assistant Secretaries and his acts were the acts of the Chelan Mining Company and he knew that Roy K. Magney had never been advised of the holding of a special meeting of the Board of Trustees of the Twisp Company for January 30th, 1934, and he also knew that the purported special meeting of the Board of Trustees of the Twisp Company of date of January 30th, 1934, was merely an "Informal Meeting" of a few of the Trustees, who had

no power or legal authority to transact any business of any kind of the Twisp Company and that all attempts of those few Trustees that were present at that informal special meeting to do so were absolutely null and void.

When James O. Cull turned over to K. H. Blaesser, Exhibit No. 7, Mr. Blaesser specifically asked him, according to K. H. Blaesser's affidavit, if he had any other papers or instruments of the Twisp Mining & Smelting Company and he answered that he had nothing else and it was not until April 4, 1944, that the Twisp Mining & Smelting Company was able to find out that James O. Cull's statements to K. H. Blaesser were false and untrue and the Twisp Mining & Smelting Company submits in good faith that the foregoing clearly shows that this United States Supreme Court has jurisdiction of this instant case and should take jurisdiction and protect the stockholders from having their rights in the property involved deliberately confiscated without due process of law on a "Forged Deed", as heretofore clearly pointed out in the foregoing State As to Jurisdiction.

In *Dehnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 Law ed. 239, 242, this Court held:

> "In the State Court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but insisted that, as to the transaction in question, the Kentucky statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The Court did not accede to the insistence, but applied the statute. Of course, that was an affirmance of its validity when so applied. * * *. *The case is therefore of the class described in the first section.* That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts, and yet be valid as applied to another. * * *. The provisions quoted from the jurisdic-

> tional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution, the mode of review depends upon the way in which the State Court resolves the question. If it be resolved in favor of the validity of the statute, the review may be on writ of error (Now Appeal), and if it be resolved against the validity, the review can only be by writ of certiorari. The provisions take no account of the particular grounds or reasons which the decision is put.

That is to say, if it be resolved in favor of the statute, as enforced by the State Supreme Court, the review may be on writ of error. In this instant case, resolved the question in favor of the Statute as it applied to the statute, that is to say, that the State Supreme Court held that Section 3803-31, paragraph 1, of Remington's Revised Statute (Sup.) of the Uniform Business Corporation Act although it provided that "Trustees" shall hold office until their successors are duly elected and qualified, still if two Trustees of a Board of Seven Trustees resign and two other Trustees are elected as members of that Board of Seven Trustees, but fail to qualify by reason of the claimed fact they never signed their "Oath of Office", that there were two vacancies on the Board of Seven Trustees, which reduced the Board of Trustees to a Board of Five Trustees, which position was repugnant to the provisions of Section 3803-31, paragraph one, of Remington's Revised Statutes of the State of Washington and by said wrongful construction the Twisp Mining & Smelting Company was deprived of the equal protection of the laws of the State of Washington in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

We respectfully submit, then, that this United States Supreme Court has jurisdiction of the instant appeal by

virtue of the statutory provisions quoted on page 3 of Appellant's Statement as to Jurisdiction and the foregoing showing therein.

Respectfully submitted,

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